SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 468

DEBS MEMORIAL RADIO FUND INC. AND HENRY GREENFIELD,

against *Petitioners,*

ASSOCIATED MUSIC PUBLISHERS, INC.

BRIEF OF PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

Opinions Below

The opinion delivered by the United States District Court for the Southern District of New York is officially reported in 46 F. Supp. 829 and is printed in this record at page 119. The opinion delivered by the United States Circuit Court of Appeals for the Second Circuit is not officially reported as yet, but is printed in this record at page 133.

Statutes Involved

This case arises under the United States Copyright Act. The novel question involved herein is the interpretation of Section 1(e) of the Copyright Act of 1909, 35 Stat. 1075, in-

sofar as it applies to non-profit, philanthropic and educational institutions. Section 1(e) provides:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right * * * (e). To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

Preliminary Statement

The petitioners are defendants against whom a final summary judgment for copyright infringement was entered in the United States District Court for the Southern District of New York on October 16th, 1942, in favor of the plaintiff, which judgment was affirmed by the United States Circuit Court of Appeals for the Second Circuit by its mandate dated June 15th, 1944.

Nature of the Action and Defenses Thereto

The action is the usual one for copyright infringement. The complaint alleges, in substance, that petitioner Debs Memorial Radio Fund Inc. (hereinafter referred to as "Debs") is the owner of Radio Station WEVD and that the individual petitioner Greenfield is its manager; and that petitioners infringed respondent's copyrighted musical composition by broadcasting a portion thereof over said Station (Fols. 7-18).

The District Court granted respondent's motion for summary judgment and the final judgment entered thereon was affirmed by the Circuit Court (R. 140).

The Factual Situation as Revealed by the Proofs

Petitioner Debs was organized in 1927 as a permanent memorial to Eugene V. Debs, a pioneer labor leader (whose initials appear in the Station's call letters) for the sole purpose of establishing and maintaining an open public

forum for discussions of political, social and economic questions and for the promotion of civic, educational and cultural purposes generally (Fols. 171, 186, 244, 246-7, 341, C. C. A. opinion, R. 135). Although it obtained its charter under the New York Stock Corporation Law, its sole activity consists of the ownership and operation of Station WEVD for philanthropic and educational purposes (Fols. 167, 263, 360, C. C. A. opinion, R. 134-137).

All of the shares of stock are held by nominees of the Forward Association, a New York membership corporation engaged in cultural activities in the United States (Fols. 209-10, 237-40). All such stockholders—twenty-five in number—are persons prominent in the community (Fol. 178). No private capital has at any time been invested, directly or indirectly, in Debs. No private capital has at any time been loaned or advanced to it, directly or indirectly (Fols. 172, 334). The by-laws of petitioner Debs expressly provide (Fols. 183-4, C. C. A. opinion, R. 135) that "none of its stockholders and directors shall be entitled to share in the profits or surplus of the corporation" and that "all profits and surplus that may arise from the operation of the station shall be used for the purpose of enlarging and extending the facilities of the station and for the improvement of the educational and cultural activities of the station."

The Board of Directors are vested with discretionary authority to allocate out of the surplus of the station funds for "educational and cultural activities" to "non-profit sharing corporations or voluntary associations organized for educational and cultural purposes."

In accordance with the by-laws, no dividends have ever been paid and none can be paid by Debs or the Forward Association. No salaries or other compensation, direct or indirect, have ever been paid or are payable to any of the

officers, stockholders or directors (Fols. 183-4, 340, C. C. A. opinion, R. 136).

Until 1931, Debs was subsidized by donations solicited from the public and operated at a deficit (Fols. 172-3). The amount of such deficit caused the passage of a resolution by the Forward Association in August, 1931, under which advances were made to Debs for its operating purposes (Fols. 172-7). Since the passage of said resolution, the Forward Association has expended for or advanced to Debs the sum of $325,000.00 for the operations of Station WEVD, exclusive of a pledge of a donation amounting to $250,000.00 of which $100,000.00 has already been contributed, and the balance of $150,000.00 is subject to call as and when needed by Debs (Fol. 179).

The close association and affiliation of Debs to the Forward Association continues to the present day (Fol. 180). Their objects and purposes are precisely identical and mutually complementary (Fol. 180). Debs is the medium by which the members of the Forward Association and other adherents to its doctrines utilize radio as an avenue of communication to advance their work in the public weal (Fol. 180).

Two decisions involving Station WEVD have been rendered by the Federal Communications Commission, which licenses the operation of the station by Debs. As late as 1940 (Fol. 185), the finding is made that Station WEVD has always been maintained as a public forum for the discussion of questions of public importance in accordance with the purposes for which Debs was organized (Fols. 186, 245-6). In fact, the decision of the District Court, which forms the basis of the judgment now under review, makes the following express findings (Fol. 362):

> "Station WEVD has been maintained largely as an open public forum for the discussion of political, social

> and economic questions, as well as for the encouragement of education. There have been well organized educational programs, daily religious services, sermons, and lectures by religious leaders, discussions of local governmental problems, and other similar activities. In the discussion of controversial questions, the facilities have been made available to persons of divergent views in order that all sides might be fairly presented."

In decisions of the Federal Communications Commission it was expressly found that petitioner Debs was providing "a unique educational service" * * * "in accordance with the purposes for which (it) was organized." (Fols. 245-6). See also Folios 185, 190, 249.

The regular daily musical program known as "The Symphonic Hour" in which was broadcast a six-minute use of only a portion of respondent's musical composition was part of the "University of the Air" (Fols. 169-70, 267). This program has for its sole purpose the bringing to its audience of serious music of high quality as an educational and cultural force, with appropriate explanatory comments and without the interruptions of commercial announcements, typical of commercial broadcast stations operating in the same area (Fols. 266-7).

The record leaves no doubt and respondent does not deny that Station WEVD functions as an instrumentality for the dissemination of educational, cultural and civic programs. A general outline of the program policy of Station WEVD, as formulated by its management, is translated into specific broadcasts with the assistance of the presidents of the local colleges and universities, government officials and political economists, lecturers and specialists in all fields of learning, eminent musicians, composers and students of music, authors of literary and dramatic works, critics of music, art, literature and the drama, the clergy, representatives of labor and capital, and other prominent and quali-

fied persons (Fols. 193-4, 264-5). Programs dealing with American history, the naturalization of aliens, the education of immigrants, the support of labor schools, consumer information, musical programs and other cultural activities squarely define the operations of Station WEVD as part of a recognized movement for public welfare (Fol. 200).

This entire public service is offered without sponsorship or commercial announcement of any kind (Fols. 169-70, 267) and with no thought of deriving any profit whatsoever (Fols. 198-9, 204, 334-5, 346, 348, 351, 353-4).

In the operation of Station WEVD a limited use of its time and facilities has been devoted to some commercial programs (Fol. 195) from which certain revenue has been derived to meet normal and reasonable operating expenses of the Station and not for any gain or profit (Fols. 196-7). Debs does not make available to advertisers the choice evening periods of its allotted broadcast time but retains such periods for its educational programs as part of its unselfish public service (Fols. 198, 342, 354). In its decisions above referred to, the Federal Communications Commission has twice made specific findings that "the income from the station has been used for extension and improvement, and not for the purpose of profit" (Fols. 186, 247). Indeed, even with such limited revenue, the Station continued to operate with a deficit (Fol. 340). The District Court expressly recognized that:

> "The revenue from these commercial programs is needed to help pay operating costs, yet it appears that there were operating deficits in each of the years 1940 and 1941 of over $40,000.00" (Fol. 363).

Respondent does not dispute that the sale of time on Station WEVD is not transacted on a competitive basis and that such activities do not compare with the sales technique and operations of commercial broadcast stations

which invariably are conducted on a totally dissimilar program policy (Fols. 196, 342, 346, 354).

The Circuit Court in its opinion (R. 136) expressly held:

> "Whatever may be the charter powers of Debs, we may assume that its ultimate objects, as it has been actually conducted, have been philanthropic and educational. In carrying out its purposes it has sought immediate commercial profit, even though the reason for doing this has been to forward its philanthropic program, and to obtain funds to achieve its objects it has given broadcasting time to advertisers."

Point I

The Broadcast Performance of a Musical Composition by a Radio Station Which Is Operated By An Eleemosynary or Charitable Institution Exclusively Devoted to Philanthropic, Benevolent and Educational Purposes Is Not a Performance "For Profit" and Cannot Form the Basis of an Action for Infringement Under the Copyright Act.

Copyright as well as patent laws founded upon Article I, Section 1, Clause 8 of the United States Constitution, "are enacted pursuant to this provision, not primarily for the benefit of individual (authors and) inventors, but for the benefit of the public". *Miller* v. *Hayman*, 46 F. (2d) 188, 196. "Whilst remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded * * *" *Kendall, et al.* v. *Winsor*, 21 How. 322.

Implementing this paramount policy, Congress has provided protection to authors and composers but only upon condition of publication of their works (35 Stat. 1075, (1909), 17 U. S. C. A.). In the case of non-dramatic musical compositions, it has secured the exclusive right of

composers to their public performance but only insofar as such performance is "for profit". These provisions were undoubtedly intended to secure to authors and composers an economic monopoly, and at the same time make available to the public in consideration thereof the intellectual benefits of such works by allowing the free use of copyrighted non-dramatic musical compositions by all eleemosynary and educational activities which are devoid of any profit motive and which cannot therefore interfere with the economic monoply afforded the author.

Clearly, in twice referring to public performance "for profit" in Section 1(e) of the Copyright Act, Congress intended to protect authors only against such uses of musical compositions as are made in connection with business activities carried on with a view to profit, i.e. for private personal gain or the accumulation of surplus earnings to be shared as profits or distributed as dividends to corporation stockholders. Congress certainly did not intend to include in the words, "public performance for profit" any use of musical compositions by eleemosynary institutions in carrying on their educational objectives for general public welfare. Obviously, no part of their activities is carried on with the view to personal advantage.

Indeed, the chief characteristic or distinctive feature of such corporations or institutions is that they are not operated for any profit, gain or benefit to anyone, but in the interest of the public. *Bodenheimer* v. *Confederate Memorial Ass'n*, 5 F. Supp. 526, affd. 68 F. (2d) 507 (C. C. A. 4th, 1934), cert. den. on the merits, 292 U. S. 629; *Ettlinger* v. *Trustees of Randolph-Macon College*, 31 F. (2d) 869 (C. C. A. 4th, 1929); *In re Michigan Sanitarium & Benevolent Ass'n*, 20 F. Supp. 979 (E. D. Mich., 1937). As pointed out in the case last cited (P. 982):

> "Such a corporation fudamentally is entirely different from a business or commercial corporation. In one,

> a man invests his money and efforts so that he may share in its profits; in the other, he gives his money so that the objects and purposes of the corporation may be furthered. He receives in return no monetary interest in the corporation. In the first, the primary purpose is to conduct a business for the purpose of making money. In the second, the primary purposes are philanthropic, humanitarian, charitable, and benevolent in character."

Moreover, the legal meaning of charitable purposes is not necessarily limited to free service to the poor. *People ex rel. Doctors Hospital, Inc.* v. *Sexton, et al.*, 48 N. Y. Supp. (2d) 201 (not yet officially reported); *Matter of MacDowell's Will*, 217 N. Y. 454, 463, 112 N. E. 177, 179, L. R. A. 1916 E, 1246, Ann. Cas. 1917 E, 853; *Young Men's Christian Ass'n of City of New York* v. *City of New York*, 159 Misc. 539, 287 N. Y. Supp. 287, aff'd 251 App. Div. 821, Aff'd 276 N. Y. 619, 12 N. E. (2d) 605; *Matter of New York University* v. *Taylor*, 251 App. Div. 444, 296 N. Y. Supp. 848, aff'd 276 N. Y. 620, 12 N. E. (2d) 606.

All liability of persons who perform non-dramatic musical compositions publicly for profit stems from the leading case of *Herbert* v. *Shanley*, 242 U. S. 591 (1917). In that case Mr. Justice Holmes held that so long as the purpose of the defendant restaurant was to perform the music in connection with a business which was operated for profit, it was a public performance for profit within the meaning of the Copyright Law. Mr. Justice Holmes said:

> "The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people hav-

ing limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough."

The earliest case dealing with radio broadcast performance of copyrighted music is *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776 (D. N. J., 1923) where District Judge Lynch followed the previous decisions interpreting the Act of 1909 and held that Station WOR, which was operated by the defendant department store owner, was made a part of the business system of defendant's store because the cost of broadcasting was charged against the general expenses of the business. The broadcast advertising of the defendant's business included the broadcast performance of copyrighted musical material which was held to be thereby infringed.

The Court held that the profit motive was predominant in the broadcast and that the station was not an eleemosynary institution.

In *Remick* v. *American Automobile Accessories Co.*, 5 F. (2d) 411, cert. den. 269 U. S. 556, the Circuit Court of Appeals for the Sixth Circuit held that the question of public performance for profit under the Act of 1909 was settled by *Herbert* v. *Shanley, supra.* In both *Remick* v. *American Automobile Accessories Co., supra,* and *Witmark* v. *Bamberger, supra,* the stations were operated under commercial licenses from the Department of Commerce and served primarily as advertising media for their owners who were operating the broadcast stations in conjunction with their respective retail business enterprises in which merchandise was sold for profit.

In the *Remick* case, the Court found that the station was maintained as a regular business enterprise with a view

to private profit by advertising a business "in the expectation and hope of making profits through the sale of one's products". The Court there also expressly recognized the necessity that

> "the purpose of the performance be for profit, and not eleemosynary; it is against a commercial, as distinguished from a purely philanthropic, public use of another's composition, that the statute is directed." (p. 412)

The same is true of *Witmark* v. *Bamberger, supra,* where the costs of operation of the station were charged against the expenses of the department store owner as advertising disbursements. The Court there called attention to the continuous mention of the store's slogan which resulted in the "development and enlargement of the business of the department store" and pointed out at page 779:

> "If the defendant desired to broadcast for purely eleemosynary reasons, as is urged, is it not likely that it would have adopted some anonymous name or initial? * * * But it does not appear, and the Court cannot believe, that those charitable acts are all labeled or stamped, 'L. Bamberger & Co., One of America's Great Stores, Newark, N. J.' "

There can be no doubt that liability for copyright infringement of a non-dramatic musical work by public performance must be predicated upon the finding of fact that the work was performed "for profit" in connection with a private business operated for profit.

The profit motive was found in each instance to consist in the performance of music unquestionably as part of the entire business activity which was designed to derive private gain in the price of food and drink purchased at a restaurant which, without music, might have been obtained more cheaply, as in *Herbert* v. *Shanley,* 242 U. S. 591, and

Buck v. *Russo*, 25 F. Supp. 317; or in the price of accommodations and facilities of a hotel which likewise might have been obtained for less elsewhere were it not for the music which was made available to guests in the rooms by the use of loudspeakers, as in *Buck* v. *Jewell-La Salle Realty Co.*, 51 F. (2d) 726, aff'd. 283 U. S. 191; *Society of European S. A. C.* v. *N. Y. Hotel Statler Co.*, 19 F. Supp. 1; or, in the price of merchandise advertised by the store owner in radio broadcasts using music, as in *Witmark* v. *Bamberger*, 291 Fed. 776; *Remick* v. *American Automobile Accessories Co.*, 5 F. (2d) 411, cert. den. 269 U. S. 556; and *Remick* v. *General Electric Co.*, 16 F. (2d) 829; or in the price for admission to a dance or amusement hall as in *Dreamland Ball Room* v. *Shapiro, Bernstein & Co.*, 36 F. (2d) 354; and *Irving Berlin, Inc.* v. *Daigle*, 31 F. (2d) 832; or in the price for admission to a motion picture theatre, *Harms* v. *Cohen*, 279 Fed. 276; *Witmark* v. *Pastime Amusement Co.*, 298 Fed. 470, aff'd 2 F. (2d) 1020; *Witmark* v. *Calloway*, 22 F. (2d) 412.

The general intent and policy of Congress in not including eleemosynary institutions within the meaning of the phrase "for profit" in Section 1(e) of the Copyright Act is manifest in other enactments. It requires no citation of authority for the proposition that in construing a particular statute, resort to other statutes always has been deemed worthy of consideration and helpful in an effort to arrive at the intention of a legislative body in the use of the particular language employed in the statute under consideration.

Thus, in enacting the Income Tax Act of 1925, Congress has specifically provided that its provisions shall not apply to corporations "organized and operated exclusively for * * * charitable * * * or educational purposes * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual." (26 U. S. C. A.

103.) Substantially identical provisions are made with respect to Capital Stock Taxes (26 U. S. C. A. 1358(c)) with reference to charitable contributions (26 U. S. C. A. 26(c)); and in the Securities Act of 1933 (15 U. S. C. A. 77(c) 4). Even a cursory examination of indices of statutes will reveal similar exemptions by all State legislatures. Such exemption, this Court has pointed out, "is made in recognition of the benefit which the public derives from corporate activities of the class named and is intended to aid them when not conducted for private gain." *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578, 581.

Such Congressional and other legislative recognition and intention, as thus expounded by this Court, evidence the general policy of the nation and the several States invariably to treat the activities of such corporations as eleemosynary and philanthropic, involving no motive of private profit, as distinguished from those of private commercial associations, or corporations which are carried on as a regular business for profit. The same general policy is revealed by the decisions of the courts (1) in interpreting statutes referring to moneyed, commercial or business corporations as not applying to eleemosynary institutions, *In re Michigan Sanitarium and Benevolent Ass'n., supra;* and (2) in establishing special principles and exceptions with respect to liability of eleemosynary corporations entirely distinct from those ordinarily applicable to corporations generally. *Ettlinger* v. *Trustees of Randolph-Macon College, supra; Bodenheimer* v. *Confederate Memorial Ass'n., supra.*

In the light of this general policy it is manifest that the provisions relative to public performance "for profit" in the Copyright Act were intended to exclude every performance of a non-dramatic musical composition in connection with activities which do not involve the profit motive.

Point II

The Use of a Limited Portion of WEVD's Allotted Broadcast Time by Advertisers Should Not Make Petitioner Liable for Copyright Infringement on the Facts Herein.

The District Court found that some revenue has been derived by the petitioner Debs from a limited use of its facilities by advertisers (Fol. 362) although it acknowledged the specific provisions of the by-laws directing the use of such funds "for the improvement of educational and cultural activities of the station" (Fol. 360). The Federal Communications Commission's findings are to the effect that "the income from the station has been used for extension and improvement and not for the purpose of profit" (Fols. 186, 247). The record also leaves no doubt, as the District Court's opinion expressly recognized (Fol. 363) that "the revenue from these commercial programs is needed to help pay operating costs, and yet it appears that there were operating deficits for each of the years 1940 and 1941 of over $40,000" (Fols. 196-7, 340, 363).

These deficits and the fact that the operation of Station WEVD continues to be financed with advances from the Forward Association amounting to $425,000.00 exclusive of public donations, remove any doubt that the income derived by the station is devoted solely to the furtherance of its eleemosynary and educational activities. Under such circumstances, the fact that a portion of the station's time is devoted to commercial broadcasts does not affect the charitable character of petitioner's Station WEVD or its exclusively philanthropic and humanitarian activities. Nevertheless, the Circuit Court of Appeals expressly held:

> "It is unimportant whether a profit went to Debs or to its employes or to the advertisers." (R. 139)

The decision of this Court in *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578, is squarely in point and conclusive of this phase of the case. There, the plaintiff had an income in rents from real estate operated by it, dividends from stocks owned by it, interest on money loaned and from the sale of stocks, wine, chocolate and other articles as well as from alms. It was contended that all these transactions prevented the plaintiff corporation from being one "organized and operated exclusively for * * * charitable * * * purposes" within the meaning of the Statute exempting such corporations from tax. This contention was described by this Court as follows at page 581:

> "Stated in another way, the contention is that the plaintiff is operated also for business and commercial purposes in that it uses its properties to produce income, and trades in wine, chocolates, and other articles. In effect, the contention puts aside as immaterial the fact that the income from the properties is devoted exclusively to religious, charitable and educational purposes, and also the fact that the limited trading, if it can be called such, is purely incidental to the pursuit of those purposes, and is in no sense a distinct or external venture."

This Court struck down this contention and said (p. 581):

> "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain. Such activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit. This is particularly true of many charitable, scientific and educational corporations and is measurably true of some religious corporations. Making such properties productive to the end that the income may be thus used does not alter or enlarge the purposes for

> which the corporation is created and conducted * * * In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit."

Likewise, in *Roche's Beach, Inc.* v. *Commissioner of Internal Revenue*, 96 F. (2d) 776 (1938), the Circuit Court held a corporation to be one "organized and operated exclusively for charitable purposes" (p. 778) within the meaning of a similar statute (26 U. S. C. A. 103 (6)), despite the fact that it was organized as a business corporation under the New York Stock Corporation Law. Its chief purpose and activities were to operate the bathing beach business of its founder and collect the income therefrom which was turned over to another corporation devoted exclusively to charitable purposes. The Circuit Court there cited with approval *In re Unity School of Christianity*, 4 U. S. B. T. A. 61, where the same result was reached in a similar situation upon the authority of this Court's decision in the *Trinidad* case, *supra*.

In *Bodenheimer* v. *Confederate Memorial Ass'n.*, 5 F. Supp. 526, aff'd. 68 F. (2d) 507 (C. C. A. 4th, 1934), cert. den. on the merits, 292 U. S. 629, a non-profit memorial corporation organized to collect Civil War data was likewise held to be an eleemosynary institution despite the fact that it charged a fee for entry into its museum. The Court there pointed out, at page 528:

> "From the testimony it clearly appears that the funds derived from admission fees are scarcely sufficient to pay the necessary expenses of keeping 'Battle Abbey' open for the benefit of historians, students, and the general public; that there has never been any profit from the operations of the association, and, even if there were profits therefrom, the trustees, under the terms of the charter, would be required to expend

such profit in the acquistion of additional historical data."

Indeed, it is common knowledge, that in almost every one of these institutions "in the carrying out of its objects and purposes it performs business transactions, which are, however, not for anyone's benefit or pecuniary gain." *In re Michigan Sanitarium & Benevolent Ass'n.*, 20 F. Supp. 979, 982 (E. D. Mich., 1937). For example, hospitals charge fees in most cases and even rent certain facilities or surplus rooms (*In re Michigan Sanitarium & Benevolent Ass'n., supra; Schloendorff* v. *The Society of the New York Hospital,* 211 N. Y. 125); while colleges and universities derive an income from tuition and other fees, as illustrated in *Ettlinger* v. *Trustees of Randolph-Macon College,* 31 F. (2d) 869 (C. C. A. 4th, 1929) and cases there cited. The income thus derived, however, does not alter the character of such corporations or affect their entirely eleemosynary activities and objectives. For, as pointed out by Professor Lile in his "NOTES ON MUNICIPAL CORPORATIONS" (1922 Ed.) pages 101-2:

> "* * * the fees so received are converted into the corporate treasury and become at once as completely dedicated to the purposes of the trust as the original corpus. One distinctive feature of such corporations is that no dividends are paid out as private profit to individuals. A college or hospital, therefore, requiring payment of fees or other compensation from students or patients may be as completely and technically a charitable institution as a like institution whose services are free to all who apply."

It is only when the net income in the form of surplus earnings is distributed as private profit to stockholders or individuals or otherwise used for personal rather than public benefits that such a corporation and its activities lose their

eleemosynary character. *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578; *Bodenheimer* v. *Confederate Memorial Ass'n., supra; Roche's Beach, Inc.* v. *Commissioner of Internal Revenue, supra; In re Unity School of Christianity, supra.*

The decision below not only ignores the profit motive as the *sine qua non* of such an infringement action but also erroneously waves aside as immaterial the fact that the limited use of the station for commercial programs is purely incidental to the pursuit of the basic educational and cultural purposes "and is in no sense a distinct or external venture". *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578, 581.

The test of liability thus adopted by the Circuit Court herein, if sustained, would transform all hospitals recognized or held to be eleemosynary institutions like those involved *In re Michigan Sanitarium and Benevolent Ass'n.,* 20 F. Supp. 979, 982 (E. D. Mich., 1937); *Schloendorff* v. *Society of New York Hospital,* 211 N. Y. 125; *People ex rel. Doctors Hospital* v. *Sexton, et al.,* 48 N. Y. Supp. (2d) 201 (1944), and place them in the same category as businesses for profit, simply because their manner of operation is the same. By the same token, all differences would be abolished which distinguished charitable organizations from their commercial counterparts. The mere similarity of some of their functions cannot destroy the fundamental difference in organic structure and purpose. For example, most universities and colleges compete with private interests in supplying living accommodations and meals, specialized instruction as well as general education, books, equipment and clothing in veritable department stores, local newspapers and magazines and a myriad of other services. Yet no one would ever challenge the eleemosynary character of such educational institutions simply because their operation is

in some respects similar to that of commercial concerns engaged in business for private profit.

The fact that Station WEVD competes with other stations for a listening audience has no bearing on the issue. Presentation of a variety of programs is inherent in the broadcasting medium. Every non-profit educational institution competes in every activity with private enterprises offering similar services. A radio station can be and is organized and operated with the same motives as any other educational institution.

A school, church or other charitable organization which rents a hotel ballroom, purchases and sells food and drink, hires an orchestra, prints a souvenir program in which it sells advertising space, and sells tickets of admission to the public, competes in all of these activities with private enterprises. The public performance of music at such charitable functions does not infringe copyrights and no attempt has even been made to urge such an untenable claim. Yet the mere fact that Debs uses the facilities of its radio station to carry on its non-profit educational objects has been distorted here to serve as the basis for respondent's specious claim of copyright infringement. The novelty of respondent's claim does not make it valid. All of respondent's contentions serve only to create false questions of fact which, in themselves, require a reversal of the decision below.

The record, including the reports and decisions of the Federal Communications Commission and even the decisions of the Courts below now under review, reveals that the activties of Station WEVD are barren of any profit implications and are in nowise motivated by any expectations of eventual private profit to petitioners. By the economics of our society, profit, direct or indirect, presupposes a gain on invested capital and a return commensurate with the risk of capital—elements wholly absent in this case.

It follows that all of the activities of Debs and its Station WEVD always have been and are eleemosynary and without any profit motive, and, therefore, the use of a portion of respondent's non-dramatic musical composition by Debs was not a performance "for profit" and cannot sustain an action for infringement under the Copyright Act.

Point III

The Broadcast of Respondent's Composition by an Eleemosynary Radio Station Constituted a Fair Use Thereof Because of the Nature of the Performance. The Extent of the Use Made of the Copyrighted Work Is Immaterial

The question of what constitutes a "fair use" of a copyrighted work has never been passed upon or settled by this Court. Despite the fact that there are at least two distinct types of fair uses which exempt the user of a copyrighted work of liability for infringement, the District and Circuit Courts throughout the country have confined the doctrine of fair use to quantitative yardsticks in disregard of the underlying rationale of such exemption. The extent of the use made by petitioners of respondent's composition has nothing whatsoever to do with their exemption from infringement liability under the doctrine of fair use herein urged. It is the nature and purpose of the use which governs such exemption.

The Courts below failed to distinguish between the foregoing doctrine of "fair use" of a copyrighted work for the advancement of education, science and art and the separate and distinct doctrine of "fair use" which has developed to sanction the limited use of a copyrighted work for purposes of criticism and comment (*Ricordi & Co.* v. *Mason,* 201 Fed. 182, aff'd 210 Fed. 277 (C. C. A. 2nd, 1913), or mimicry (*Savage* v. *Hoffmann,* 159 Fed. 584; *Bloom & Hamlin* v.

Nixon, 125 Fed. 977; see *Chappell & Co.* v. *Fields*, 210 Fed. 864). This distinction is pointed out in *Towle* v. *Ross*, 32 F. Supp. 125, 127, n. 4. These authorities hold that fair usage in the latter sense is merely another way of saying that no substantial part of a copyrighted work has been appropriated. Petitioners, however, contend that the true legal significance of the doctrine of fair use is that no infringement liability can be predicated upon the appropriation, performance or other use of a copyrighted work by a charitable or educational organization in connection with the advancement of knowledge. Such judicial immunity arises by implication of consent or equitable estoppel of a copyright owner by reason of the fundamental theory of copyright protection to the author for the benefit of the public. *Miller* v. *Hayman*, 46 F. (2d) 188, 196.

Respondent had knowledge before the performance by petitioners of respondent's work that the composition herein involved would be broadcast as part of the "Symphonic Hour" program (Fol. 137). Respondent may be charged with direct knowledge of the long established cultural, educational and non-commercial character of the "Symphonic Hour" program. Even if respondent had no such direct knowledge, it may be held at law to have given its implied consent to the use of the said work for the advancement of the art of music and for educational purposes. Such use by the petitioner may be deemed to be no more than a fair use of respondent's copyrighted work by an eleemosynary corporation.

As was said by Judge Maris in *Henry Holt & Co., Inc., et al.* v. *Liggett and Myers Tobacco Co.*, 23 F. Supp. 302 (E. D. Pa., 1938):

> "It is true that the law permits those working in a field of science or art to make use of ideas, opinions, or theories, and in certain cases even the exact words contained in a copyrighted book in that field. *Sampson &*

Murdock Co. v. *Seaver-Radford Co.*, 1 Cir., 140 F. 539. This is permitted in order, in the language of Lord Mansfield in *Sayre* v. *Moore*, 1 East 361, 102 Eng. Reprint 139, 'that the world may not be deprived of improvements, nor the progress of the arts be retarded.' In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art.''

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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